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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 356

I. POSNER, INC.; POSNER DISTRIBUTING CORP.; POSNER BEAUTY AND BARBER SUPPLY CORP.; HAMILTON POSNER,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Statement

This brief is respectfully submitted in reply to the Brief for the National Labor Relations Board, filed in opposition to the petition for a writ of certiorari filed on behalf of petitioners. In its brief in opposition, the board, in a very short statement and argument, which grossly distorts the facts, record and issues in this case, virtually dismisses petitioners' arguments and case as if with a wave of the hand. This cavalier treatment of the important issues presented by the petition requires that this reply brief be filed.

For the reasons set forth hereinafter and in the original petition, it is respectfully submitted that certiorari should be granted on the issues presented in the petition, and that this case should be briefed on the merits and set for argument before the Court.

Discussion

In its cryptic, almost disjointed, statement, the respondent board has disregarded nearly all of the factual matters relevant to the issues raised by petitioners. From a hearing transcript of over 700 pages, the board has culled a few facts, has seriously distorted a few other factual matters, and has disregarded the factual heart of the case. In this reply brief we shall follow the sequence of the board's statement in its brief, and contrast this statement with the actual facts in the record:

1. The board states that in the summer of 1962, the union started an organizing campaign among petitioners' employees; that on August 3, 1962 (Friday), it filed a petition for a representation election and sent a letter to petitioners claiming to represent a majority of employees, to which letter petitioners did not reply (Br. in Opp., p. 2). The purpose of this recital in this short brief is mystifying. The facts are that petitioners first knew of union organizing activity on or after August 6, 1962 (Monday) (J.A. 40-41), which was after the discharges of Norma Pinero and Ricardo Ortiz, and without any knowledge of any union activity by either of them. Moreover, there was no proof in the record of the mailing of this letter or its receipt by petitioners. If this letter was mailed on August 3 (Friday), the earliest petitioners would have received it in the normal course of business would be August 6 (Monday).

2. The board then states that on August 15, while employees were talking together on the street, Hamilton Posner appeared and made statements, among which was that the union "would never have an election"; that Posner told the union organizer he had no right to be there and that he called the police; that on many occasions Posner "surveilled the meeting", calling out he only wanted

"friends" to work for him (Br. in Opp., p. 3). Apart from the fact that Mr. Posner would have an absolute right under the "free speech" doctrine to make statements to his employees, Mr. Posner denied making the alleged statements (J.A. 300-301); his request to the union organizer to move his meeting across the street was to insure that there be no blocking of the street or the plant entrance (J.A. 301), and to prevent any coercion of his employees by the union (the board having previously found the union guilty of coercive organizing tactics (*NLRB* v. *Posner, Inc.*, 304 F. 2d 773)); and there is no proof that Posner or anyone employed by him called the police. Furthermore, the union organizer admitted standing in front of petitioners' employees entrance at the time of the incident recited in the board's brief (J.A. 49).

3. The remainder of the board's statement is devoted to discussing only three of the eight former employees involved in this case (Br. in Opp., pp. 3-5). Two of them, Norma Pinero and Ricardo Ortiz, were discharged prior to the filing of the union representation petition or prior to petitioners' knowledge of such filing, and without any showing that petitioners knew of their union adherence (Pet., p. 6). The board states that petitioners contend that Ricardo Ortiz was laid off due to a lack of work, but that another helper was hired on July 31, and that thereafter two more were "rehired", citing as its authority J.A. 17, 247, 249-251 and 254-255. This misleading statement blatantly distorts the record and gives the complete lie to the entire board's case herein. The facts are that Ricardo Ortiz worked as a helper in the acid and washing department in the manufacture of wigs and hair goods. He spoke virtually no English (J.A. 14, 163, 164). He was laid off on August 3, 1962, because things were slow *in his department*, and he was never replaced (J.A. 308).[1] Carlos

[1] Had Ricardo been replaced, his brother Marcos, who worked in the same department until the fire, would have so testified.

Perez, who was hired on July 31, worked in the shipping department, where knowledge of English was essential (J.A. 247). The other two who were "rehired" were Melvin Turso and Lackland Oliver, each of whom had previously worked for petitioners, and each was rehired to work in the shipping department (J.A. 249-251, 254-255). Turso, who had previously left to return to college, was rehired on September 26, 1962, while Oliver, who had left to work for his brother-in-law, was rehired in August, 1962. None of these three had ever done the work done by Ricardo Ortiz, and no one was ever hired to replace him.

4. As to the third employee, Marcos Ortiz, contrary to the impression sought to be created by the board (Br. in Opp., p. 5), he was not rehired after the fire which destroyed petitioners' factory, because he had taken another job (Pet., pp. 6-7). As to the facts relating to the other five former employees, the board has not seen fit to discuss them, and accordingly petitioners' factual statement should be accepted as true by the Court (Pet., pp. 7-8).

In its argument, the board refers to petitioners' claim of an unfair hearing before the board's trial examiner by remarking that only three examples were "selected" from the transcript of over 700 pages (Br. in Opp., p. 6). Actually, these three examples were cited by petitioners as being typical examples of the examiner's bias and prejudice towards petitioners and their counsel, while reference was made to the "many more examples in the record of the hearing examiner's improper conduct of this hearing" (Pet., p. 10). The complete record speaks clearly of the fact that these petitioners were denied a fair hearing in these proceedings. One of the most serious charges petitioners level at the hearing examiner was his refusal to permit their counsel to conduct meaningful examinations of witnesses called at the hearing. Part of the examiner's bias was demonstrated by his refusal throughout the hearing to allow counsel to question witnesses about prior

contradictory or inconsistent statements they made to investigators for the board.[2] It is the complete record which proves the examiner's bias, not isolated examples taken from the record.

It is to be noted that the board in its brief in opposition refers to the fact that "the record contains an admission by the Company Supervisor that they (Norma Pinero and Ricardo Ortiz) were fired for belonging to the union (Br. in Opp., pp. 3-4)" which in turn refers to "(J.A. 14; 95-96, 114-116)." These page references to the Joint Appendix refer to the examiner's report (14) and to testimony by Guillermo Cuellar (95-96) and his wife, Alba Cuelar (114-116), as to a conversation with a purported supervisor as to the discharge of several other employees, including Norma Pinero and Ricardo Ortiz.[3] However, the "supervisor" allegedly involved in this conversation, Jose Greenberg, was not a supervisor but essentially acted as a translator, and he denied that the conversation took place (J.A. 262-268). Moreover, this is weak evidence, at best, by personally interested witnesses, to sustain a finding of discharge for union activities of other persons discharged before such claimed union activity became known to petitioners.

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[2] See, for example, the affidavit of Ricardo Ortiz, given to a board investigator on October 8, 1962, stating that he was never offered advantages or benefits by the company to induce him not to join the union or to abandon it, and that he would not return to work for Posners unless he received a higher salary than he received while there. Petitioners were not permitted to inquire about this matter unless they accepted the entire affidavit in evidence, which they refused to do (J.A. 179-181). There are other examples in the record of this improper trial practice. See, among others, J.A. 122-123, 194, 203, 220.

[3] Other employees mentioned in this alleged conversation as having been discharged for belonging to the union are Carmen Cruz and Sara Sarmiento (J.A. 96). No unfair labor practice charges were filed on behalf of these persons.

As to the discharge of Cuellar and Coello, the uncontradicted facts are, as stated in the petition, that they were physically unable to do the work assigned to them, and they were replaced by women with better digital dexterity and adeptness for such work (Pet., pp. 7-8).

Finally, as to Marcos Ortiz and Santiago, it is alleged that the failure to rehire them after the fire was discriminatory and for union activity. Actually, both were recalled to work after the fire, but neither was willing to help with the salvage operations (J.A. 155, 312), and both took jobs elsewhere. The failure to re-employ them after the fire was completely unrelated to union activity.

From the foregoing, it is clear that the basis for the findings of unfair labor practices, is not to be found in the evidence and that such findings are not supported by substantial evidence within the test of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474 (1951), and *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 229 (1938).

Finally, in order to avoid the issue raised by petitioners that the decree of the Court of Appeals, directing the reinstatement with back pay of the eight former employees, was unwarranted and improper, the board argues (Br. in Opp., p. 8) that this contention is barred by § 10(e) of the Act (29 U.S.C. § 160(e)) by the alleged failure of petitioners in their exceptions to take exception to this portion of the recommended order by the trial examiner, or to argue it to the court below. The fact is, there was such exception taken to the trial examiner's Intermediate Report, Exception No. 51, filed with the board. The court below entered its own decree of enforcement and the question of the scope of that decree is properly raised before this Court. In light of the severe economic penalty imposed against petitioners by the order of reinstatement with back pay, the question of the scope of that decree should be reviewed by this Court, without waiting for the completion of compliance proceedings before the board.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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September 15, 1965

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